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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 525

STANLEY R. HEMPHILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF

MELVILLE MONHEIMER,
Seattle, Washington,
Attorney for Petitioner.

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Petition for Writ of Certiorari

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To the Honorable the Supreme Court of the United States and to the Honorable Justices thereof:

Stanley R. Hemphill respectfully petitions the Honorable the Supreme Court of the United States and the Honorable Justices thereof for a Writ of Certiorari to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit in cause Number 9056, entered June 3, 1941, affirming the judgment of his conviction by the United States District Court for the Western District of Washington, Northern Division.

120 F2d 115 in which it said that as a matter of fact the sufficiency of the evidence had been given consideration in its former opinion (112 F2d 505) but stated that it had declined to discuss the merits of the question of the sufficiency of the evidence because it did not feel privileged so to do and then proceeded to conform with the specific directions of this court and reexamine the testimony and exhibits to determine whether the evidence was sufficient to support the verdict.

The opinion recites certain isolated facts which are just as consistent with innocence as they are with guilt and then concludes that the evidence must be viewed in every possible light favorable to the Government and says that so viewed it is sufficient to support the verdict without in the opinion pointing out wherein the facts support the evidence or wherein the facts are consistent with guilt and inconsistent with innocence.

JURISDICTION TO GRANT WRIT

Defendant was convicted in the United States District Court of violation of Section 338, Title 18 U. S. C. A.

He appealed from this conviction to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the judgment of conviction on June 3, 1940, and denied defendant's petition for rehearing on July 25, 1940.

Certiorari was granted by this, the Supreme Court, and the decision was reviewed and remanded by this court on March 3, 1941, 85 L. Ed. 641, and the Circuit Court rendered its subsequent opinion on June 3, 1941 and petition for rehearing was denied July 17, 1941.

This court has jurisdiction to review the judgments of the Circuit Court of Appeals (Judicial Code, 240 (a), 43 Stats. 938; 28 U. S. C. A., Sec. 347.)

Petitioner believes that his case comes under rule 38, Section 5, sub-division (b) of the Rules of the Supreme Court.

ERRORS RELIED UPON

Defendant contends that:

1. The evidence was insufficient to prove the commission of any crime.

2. Under the local practice it was reversible error for the district attorney, in questioning a character witness, to infer that the witness while acting as attorney for the defendant on trial had theretofore advised the defendant to plead guilty. Defendant contends that a reading of said cross-examination will disclose that the purpose of said questions was to prejudice the jury against the defendant by implanting in their minds the thought that the witness had in fact advised the defendant to plead guilty, even though the witness denied having so advised him.

3. It was prejudicial error to permit the witness, Colhour, to testify to facts inferring that the defend-

ant had stolen a typewriter and that his objection thereto made after the question was answered should have been and should now be considered as a motion to strike the testimony.

4. That the facts recited in the opinion of the Circuit Court as having been proven by the evidence and exhibits are all consistent with innocence and not inconsistent with guilt, and therefore the Court erroneously concluded that the facts as recited proved the commission of a crime.

Dated, Seattle, Washington, August 14, 1941.

MELVILLE MONHEIMER,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Seattle, Washington, August 14, 1941.

MELVILLE MONHEIMER,
Attorney for Petitioner.

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I

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on June 3, 1941.

This opinion was rendered after a reversal by this, the Supreme Court, rendered March 3, 1941 of a prior decision in this cause of said Ninth Circuit rendered, entered and filed June 3, 1940, 112 F2d 505.

II

STATEMENT OF THE CASE

The foregoing petition contains a concise statement of the grounds on which the jurisdiction of this court is invoked and a statement of the questions presented and a specification of the four errors intended to be urged and, therefore, the same will not be repeated in this brief.

III

FIRST ERROR RELIED UPON

The Bill of Exceptions contained in the transcript of the record filed in the Circuit Court of Appeals and certified transcript which has been filed in this Court contains all of the evidence introduced in the case.

If, as a matter of fact as contended by the defendant, the evidence was not sufficient to prove any crime it seems to us that it would shock the sense of justice of any Court to permit the defendant to be committed to the penitentiary. Courts have often said that the parties cannot, by stipulation, give the court jurisdiction when none in fact exists and we think here that the record should be examined to determine whether or not facts sufficient to constitute a crime were proven.

SECOND ERROR RELIED UPON

The Circuit Court in its opinion made reference to the questions propounded by the District Attorney in the cross-examination of John J. Sullivan as to

whether or not the witness, John J. Sullivan, had advised the defendant to plead guilty, had this to say upon page four of the opinion of June 3, 1940:

> "True, we have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful. But that is not the case here. While we think the harm done by the question was mitigated by the answer and that no prejudice appears sufficient to warrant a reversal, nevertheless we do not wish to be understood as approving the question. It went beyond the subject matter of the direct examination and s h o u l d not have been asked."

From the foregoing it will be seen that the Court disapproved the question but declined to find prejudicial error and reverse the case.

We think an intimation by the district attorney that defendant's own counsel had advised him to plead guilty would so prejudice the jury against him that he could not have a fair trial.

THIRD ERROR RELIED UPON

The following excerpt is from page five of the opinion of June 3, 1940:

"Q. What did you say?

A. I asked him if he sold my typewriter.

MR. MIRACLE (counsel for Hemphill): I object to it as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. MIRACLE: Exception.

THE COURT: Exception allowed.

Q. What did he say, Mr. Colhour?

A. He informed me he didn't know where it was, that he had one missing himself.

Q. Did you ever get it back? A. No."

> "The only objection made to any of this line of testimony was interposed *after a* question was *answered.* An exception was taken; but there was no motion to strike."

We think the Court placed form over substance. Manifestly it was improper for the assistant District Attorney to introduce evidence of the commission of an independent crime by the defendant. The object and purpose must have been to prejudice the jury against the defendant and lead them into a frame of mind that they would convict the defendant in the case at bar although the evidence was insufficient, because they thought he committed other crimes.

FOURTH ERROR RELIED UPON

The practice of law enforcement by Writs was exclusive at one time in common law courts and may have been sufficient for the needs of that day but we are all prone to believe that when a wrong was committed it was better to describe the wrong in plain language than to refer to it as a writ of trespass or trespass on the case, etc. We say progress has been made when the language of the Court can be understood by the man on the street. It is the practice in

every jurisdiction in this country to have the decisions of the Supreme Court in writing so that they can be read and that the litigants and other parties in interest may know just what the Court did decide.

It is our contention that the opinion of the Circuit Court of Appeals for the N i n t h Circuit here sought to be reviewed, although it recites certain facts about equipment and about the cost of pamphlets studied by the students and that students were required to pay $5.00 and $10.00 per month, it does not analyze the evidence and exhibits and point out just how the unrelated facts go to prove the commission of a crime. It is the nearly universal practice for petitions for rehearing to be simply denied without opinion but the presentation to a court on an appeal from a trial on the merits we think requires an opinion which shows wherein the facts go to prove the commission of the offense charged.

Respectively submitted,

MELVILLE MONHEIMER,

Attorney for Petitioner.

Due service and receipt of a copy of the within is hereby admitted this.....day of..... 1941.

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United States Attorney

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Assistant United States Attorney,

Attorneys for Respondent.

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THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 367–371) is reported in 120 F. (2d) 115.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 3, 1941 (R. 371), and a petition for rehearing was denied July 2, 1941 (R. 372). The petition for writ of certiorari was filed August 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the fraudulent scheme for the operation of which petitioner was convicted under the mail fraud statute.

2. Whether reversible error resulted because government counsel, after a defense witness had testified in support of petitioner's claim of good faith, asked the witness on cross-examination whether he had not at one time stated that he would advise petitioner to plead guilty.

3. Whether reversible error arose from the government's interrogation of an alleged victim of the fraudulent scheme regarding the disposition by the petitioner of a typewriter which the witness had delivered to petitioner as part payment in one of the allegedly fraudulent transactions.[1]

STATEMENT

Petitioner and two others were indicted in the District Court for the Western District of Washington on eight counts charging violation of the mail fraud statute (18 U. S. C. Section 338) and

[1] A fourth "error" relied upon in the petition (Pet. 12) is that the facts referred to by the Circuit Court of Appeals in its review of the evidence are "consistent with innocence." This issue is not substantially distinguishable from Question No. 1, above.

on a ninth count charging a conspiracy to violate that statute (18 U. S. C. Section 88) (R. 2–28). The indictment alleged that the defendants engaged in a fraudulent scheme to secure money from persons who could be induced to enroll in courses in diesel mechanics and engineering or in electrical refrigeration and air conditioning at schools conducted by the defendants, by misrepresenting that these schools were well established and widely respected, well equipped with tools and machinery for practical training and with a capable staff of teachers for theoretical instruction (R. 3–4).

Petitioner was convicted upon all counts except the third and ninth (R. 29), and was sentenced to imprisonment for 21 months (R. 33–34). In affirming this conviction the Circuit Court of Appeals for the Ninth Circuit stated that it was "precluded from questioning the sufficiency of the evidence" by petitioner's failure to move for a directed verdict at the close of all the evidence. 112 F. (2d) 505, 506. After this Court granted certiorari (311 U. S. 634) upon a petition raising the same questions presented by the present petition, the Government filed a brief answering petitioner's contentions on the merits, but conceding that a remand with instructions to consider the sufficiency of the evidence would be warranted in view of the doubt concerning whether the court below had examined the evidence sufficiently to assure

itself that the conviction was not plainly erroneous.[2] Accordingly this Court reversed and remanded with directions to consider the sufficiency of the evidence, 312 U. S. 657.

Thereafter the Circuit Court of Appeals rendered the decision now sought to be reviewed. The court below concluded that petitioner's conviction was supported by evidence "which excluded every other hypothesis save that of guilt" (R. 371).

ARGUMENT

The issues raised by the present petition were fully treated in our brief on the merits in No. 369, October Term, 1940. We here summarize the arguments made in that brief at pp. 12–37.

I

The evidence of petitioner's guilt was more than sufficient. After an earlier unsuccessful venture called "Diesel Power Engine Schools" (R. 295) petitioner in 1935 began operating as "Hemphill Trade Schools" with an office at a mailing bureau (R. 278). Although he had no school room for instruction and "only offices for research work," petitioner offered two weeks shop training as part of a course in diesel engineering (R. 278, 297). Following complaints to the local prosecuting attorney by petitioner's brother who operated trade

[2] See Government's brief in Case No. 369, October Term, 1940, at p. 11.

schools under the name of Hemphill, petitioner adopted the name "International Engineering Institute" (R. 280, 295–296, 299) and, under the name of the "International Air Conditioning Institute," also began advertising for students in air conditioning and refrigeration (R. 279, 281).

When students who had enrolled in the diesel course upon the representation that there would be shop training, complained of the lack of equipment, petitioner said he did not have enough students to pay him to put in the equipment (R. 69–71). He also endeavored to switch complainants to air-conditioning courses at a higher tuition stating that the diesel was "dying out" and that air conditioning was now "the big thing," although then and thereafter he was advising new diesel students that it was "America's most rapidly growing industry" (R. 69, 76–78, 155–156, 164, 203, 246). Petitioner indicated to one of his instructors that he did not expect to make good on his promise of shop training since his experience had shown that ninety percent of the students dropped out before they completed the course on theory and that "enough lessons were given, and they were hard enough so that possibly the other 10% would drop out" (R. 164). There was also evidence that petitioner's salesman engaged in still grosser misrepresentations, e. g. that the Government was helping students get through the school (R. 72, 81–82), that the school furnished transportation to Seattle (R.

85, 99, 102, 103), that the organization had schools all over the country and in foreign countries (R. 153, 157, 190–192).

Petitioner's testimony in his own behalf (R. 275–305) contradicted in some particulars the testimony given against him by his students and instructors and by other government witnesses. We submit, however, that such conflicts were properly referred to the jury for determination and that the evidence supporting its conclusion that petitioner was guilty is convincing.

II

Petitioner complains that it was improper for the District Attorney to inquire of a character witness whether he had not stated that he would advise the defendant to plead guilty (Pet. 11). The witness, Sullivan, was petitioner's attorney of record but did not participate in the trial (R. 308). His testimony went far beyond the confines of character testimony, and dealt with his professional advice to petitioner in connection with the various school enterprises (R. 307–308). He stated, among other things, that petitioner had led him to believe "he would use his every effort" to live up to his contracts (R. 308). Under the circumstances it was proper impeachment of the witness' direct testimony in support of petitioner's good faith to inquire whether the witness had not stated that he would advise petitioner to plead guilty. See 2

Wigmore on Evidence (3d ed.) Secs. 1017–1023. And since the witness denied having made any such statement no prejudice resulted from this incident.

III

Petitioner urges that the witness Colhour was erroneously permitted to testify concerning facts from which it might have been inferred that petitioner had stolen a typewriter (Pet. 11–12). Colhour had agreed to take a course in air conditioning and had delivered the typewriter to petitioner under an arrangement by which petitioner was to sell it and apply the proceeds on Colhour's tuition fee. The witness then testified that petitioner later told him that the typewriter was missing and that petitioner had not returned or accounted for it (R. 255–256). It was clearly competent for the Government to show the arrangement between the petitioner and Colhour with respect to the latter's paying for the course. The fact that it was remotely possible to infer from the testimony that petitioner had wrongfully disposed of the typewriter could not render inadmissible testimony which was otherwise competent. *Moore* v. *United States,* 150 U. S. 57, 61.

CONCLUSION

Petitioner points to no conflict of decisions or other special or important reason for granting cer-

[illegible] in this case. His conviction was just. We therefore respectfully submit that he petition should be denied.

[illegible] Hart,
Acting Solicitor General.

William L. Hyde,
Assistant Attorney General.

[illegible] A. Provost,
[illegible] B. Southard,
Attorneys.

September 1903.